

# SUBSISTENCE HUNTING AND FISHING IN ALASKA: DOES ANILCA'S RURAL SUBSISTENCE PRIORITY REALLY CONFLICT WITH THE ALASKA CONSTITUTION?

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## ABSTRACT

*All parties to the subsistence controversy in Alaska (the state and the federal government, sportsmen's associations, outdoor organizations, and Native groups) have assumed that the Alaska National Interest Lands Conservation Act (ANILCA) grants residents of rural Alaska an exclusive right to engage in subsistence hunting and fishing on public lands. As a result, there appears to be an intractable contradiction between the "equal access" provisions of the Alaska Constitution and the subsistence provisions of ANILCA. This Article will question this widespread assumption. It will argue that while it is true that ANILCA creates a subsistence priority preference for rural Alaskans in the sense that at those times when fish or wildlife populations are threatened, rural Alaskans will be the very last group to have their right to subsistence hunting or fishing limited (i.e., ANILCA's rural preference), the text of ANILCA does not support the claim that it creates a right to subsistence hunting and fishing on public lands that belongs exclusively to residents of rural Alaska. Consequently, there is no intractable contradiction between the Alaska Constitution and ANILCA.*

## INTRODUCTION

One of the most divisive and intractable political issues in Alaska is subsistence hunting and fishing. Although the Alaska National Interest

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Conservation Act (ANILCA)<sup>1</sup> creates a “priority preference” for “subsistence uses” of fish and game,<sup>2</sup> the Federal government has taken the position that ANILCA creates an exclusive right for rural residents of Alaska to engage in subsistence hunting and fishing on public (federal) lands in Alaska.<sup>3</sup> The Alaska Supreme Court, however, has ruled that the Alaska Constitution prohibits any statutory requirement “that one must reside in a rural area in order to participate in subsistence hunting and fishing.”<sup>4</sup>

As a result of this impasse, the Federal government has taken over the administration of subsistence hunting and fishing on public lands in Alaska.

This state of affairs has divided Alaskans into two camps: one group argues that the Alaska Constitution should be amended to bring it into compliance with ANILCA; the other group argues that ANILCA should be amended to bring it into compliance with the Alaska Constitution.

This Article proceeds in two parts. Part One will briefly discuss the history of subsistence in Alaska up to the federal takeover of the management of subsistence hunting and fishing in 1990. Included in Part One is a discussion of the principal cases, state and federal, that have shaped the subsistence controversy.

Part Two will examine the plausibility of the claim that ANILCA limits the right to engage in subsistence hunting and fishing on public lands exclusively to residents of rural Alaska. The central conclusion of this Article is that the text of ANILCA does not support this claim.

Part Two will also examine how the factors of “customary and direct dependence,” “local residency,” and “availability of alternative resources” that are identified in the subsistence preference system created by ANILCA<sup>5</sup> ensure that at times when the viability of fish or wildlife populations are threatened, the residents of rural Alaska will be the very last group to have their subsistence rights limited. Lastly, this section will address the concern that the “local residency” factor of ANILCA’s subsistence priority preference conflicts with the Alaska Supreme Court’s decision in *State v. Kenaitze*.<sup>6</sup>

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1. 16 U.S.C. §§ 3101–3233 (2006).

2. §§ 3113, 3114.

3. See 50 C.F.R. §100.5(a) (2010) (“You may take fish and wildlife on public lands for subsistence uses only if you are an Alaska resident of a rural area or rural community.”).

4. *McDowell v. State*, 785 P.2d 1, 9 (Alaska 1989).

5. 16 U.S.C. § 3114.

6. 894 P.2d 632 (Alaska 1995).

## PART ONE

### I. SUBSISTENCE HUNTING AND FISHING PRIOR TO ALASKA STATEHOOD

Before the arrival of European explorers in 1741, Alaska had a population of between 60,000 and 80,000 Native people,<sup>7</sup> all of whom lived a subsistence lifestyle.<sup>8</sup> Although Alaska Natives increasingly relied on permanent villages after the arrival of the Europeans and the introduction of European-style commerce (commercial fur seal hunting, commercial fishing, whaling, and a cash economy),<sup>9</sup> many maintained this subsistence lifestyle into the nineteenth century.<sup>10</sup>

In 1867, the United States purchased Alaska from Russia.<sup>11</sup> The first congressional act that provided for civil government in Alaska, the District Organic Act,<sup>12</sup> said nothing about subsistence hunting and fishing.<sup>13</sup> Neither did the Alaska Territorial Organic Act passed in 1912.<sup>14</sup>

The purchase of Alaska by the United States initially had little effect on the subsistence activities of Alaska Natives. These activities persisted until salmon canneries, utilizing company-owned fish traps, took over fishing streams traditionally used by Native clans.<sup>15</sup>

Fish and game legislation affecting Alaska, passed by Congress in 1902, 1924, and 1925, generally did not address the position of Alaska Natives.<sup>16</sup> As for the Alaska Territorial Legislature, it had no power to enact laws regulating fish and game in Alaska; this authority was reserved by Congress.<sup>17</sup>

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7. FRANK NORRIS, ALASKA SUBSISTENCE: A NATIONAL PARK SERVICE MANAGEMENT HISTORY 1 (2002).

8. *Id.* at viii.

9. *Id.* at 4-5.

10. *See id.* at viii, 1.

11. *See id.*

12. Act of May 17, 1884, ch. 53, 23 Stat. 24.

13. *Id.* By 1890, fewer than 5000 non-natives lived in Alaska. *See* NORRIS, *supra* note 7, at 1.

14. Act of Aug. 24, 1912, Pub. L. No. 62-334, ch. 387, 37 Stat. 512 (creating a Legislative Assembly in the Territory of Alaska and conferring legislative power).

15. NORRIS, *supra* note 7, at 2-3.

16. *See* Act of Jan. 13, 1925, Pub. L. No. 68-320, ch. 75, § 10, 43 Stat. 739, 743-44 (protecting game animals, land fur-bearing animals, and birds in Alaska); Act of June 6, 1924, Pub. L. No. 68-204, ch. 272, §§ 4-5, 43 Stat. 464, 466 (protecting the fisheries of Alaska); Act of June 7, 1902, Pub. L. No. 57-147, ch. 1037, § 1, 32 Stat. 327, 327 (protecting game in Alaska).

17. § 3, 37 Stat. at 512 (creating a Legislative Assembly in the Territory of Alaska and conferring legislative power). Prior to statehood, the Federal

During the territorial period, it was generally true that “Natives and non-Natives . . . were able to pursue fishing for personal-use purposes with few restrictions.”<sup>18</sup> And when a dispute did occur over resources, “federal agencies sometimes intervened on behalf of rural users, both Native and non-Native.”<sup>19</sup>

## II. SUBSISTENCE HUNTING AND FISHING AFTER ALASKA STATEHOOD

### A. The Alaska Statehood Act and Subsistence

On January 3, 1959, Alaska became the forty-ninth state.<sup>20</sup> Section 1 of the Alaska Statehood Act<sup>21</sup> accepted and ratified the Alaska Constitution, which had previously been adopted by the people of Alaska in an election held on April 24, 1956.<sup>22</sup>

Three sections in article VIII of the newly enacted constitution would later prove to be central in analyzing the yet unasked question of the constitutionality of a subsistence priority for rural Alaskans:

Section 3 Common Use. Whenever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use.

....

Section 15 No Exclusive Right of Fishery. No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. . . .

....

Section 17 Uniform Application. Laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.<sup>23</sup>

These sections, taken together, reinforced the general principle that all Alaskans, rural or non-rural, Native or non-Native, should have

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government owned more than ninety-nine percent of Alaska’s land. NORRIS, *supra* note 7, at 9.

18. NORRIS, *supra* note 7, at 7.

19. *Id.*

20. Proclamation No. 3269, 24 Fed. Reg. 81 (Jan. 3, 1959).

21. Alaska Statehood Act, Pub. L. No. 85-508, § 1, 72 Stat. 339, 339 (1958).

22. *Id.*

23. ALASKA CONST. art. VIII, §§ 3, 15, 17.

equal access to Alaska's fish and game resources – at least as far as these resources are found on public land.

On the other hand, the question of what land was public and what land was owned by Natives in Alaska was left unanswered. Section 8 of Alaska's District Organic Act provided:

[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.<sup>24</sup>

This principle was also reflected in section 4 of the Alaska Statehood Act. It created a compact between the new state and the United States whereby the people of Alaska "forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives."<sup>25</sup> At the same time section 6(b) of the Alaska Statehood Act permitted the new state to select up to 102,550,000 acres from "vacant, unappropriated, and unreserved" public lands held by the United States.<sup>26</sup>

The tension between section 6(b) of the Alaska Statehood Act on the one hand and section 8 of the District Organic Act and section 4 of the Alaska Statehood Act on the other was not resolved until the passage of the Alaska Native Claims Settlement Act (ANSCA) in 1971.<sup>27</sup>

As for the question of who has the authority to manage fish and wildlife resources on public land in Alaska, section (6)(e) of the Alaska Statehood Act mandated that the Federal government transfer this authority over to the state provided "the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest."<sup>28</sup>

## **B. Alaska's First Fish and Game Law**

In 1959, the Alaska Legislature enacted into law an act related to the management of fish and game.<sup>29</sup> The Act (the Fish and Game Code of

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24. Act of May 17, 1884, ch. 53, § 8, 23 Stat. 24, 26.

25. § 4, 72 Stat. at 339.

26. *Id.* § 6(b), at 340.

27. 43 U.S.C. §§ 1601–1629h (2006).

28. § 6(e), 72 Stat. at 340–41.

29. Fish and Game Code of Alaska, ch. 94, 1959 Alaska Sess. Laws 89.

Alaska) created the Board of Fish and Game and the position of Commissioner of Fish and Game.<sup>30</sup> It also set sport fishing and hunting license fees<sup>31</sup> and created a procedure for the licensing of commercial fishermen and vessels.<sup>32</sup>

In 1960, the Fish and Game Code was amended to include subsistence fishing.<sup>33</sup> This amendment drew a distinction between sport fishing and subsistence fishing on the basis of personal use and the kind of gear used for fishing.<sup>34</sup> It prohibited those engaged in subsistence fishing from selling or bartering fish<sup>35</sup> and required those who wanted to engage in subsistence fishing to obtain a license.<sup>36</sup> Persons with an annual income exceeding \$4,000 were not eligible for subsistence fishing licenses.<sup>37</sup> The amendment to the Fish and Game Code did not create any kind of preference for subsistence fishing, however. The amendment also made no distinction between sport hunting and subsistence hunting.

### C. Subsistence and the Alaska Native Claims Settlement Act

Prior to the passage of the Alaska Native Claims Settlement Act (ANCSA),<sup>38</sup> the only lands owned by Alaska Natives were a number of 160-acre parcels acquired under the Alaska Allotment Act of 1906<sup>39</sup> as well as any individual parcels that may have been acquired by Natives.<sup>40</sup> And except for the Metlakatla Reservation<sup>41</sup> near Ketchikan, there were virtually no communal lands held by Native groups.<sup>42</sup> All this changed with the passage of ANCSA in 1971.

In brief, ANCSA resolved the native land issue by first creating Native Regional and Native Village Corporations,<sup>43</sup> both governed by shareholders who are Alaska Natives and who resided within each

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30. *Id.* §§ 4, 6, at 90-91.

31. *Id.* § 2, at 97-98.

32. *Id.* §§ 1-13, at 99-102.

33. Act of Apr. 16, 1960, ch. 131, sec. 4, § 2, 1960 Alaska Sess. Laws 179, 179.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* sec. 8k, § 22, at 183 (amending the Fish and Game Code of Alaska, ch. 94, § 8, 1959 Alaska Sess. Laws 89, 101, by adding a new subsection).

38. 43 U.S.C. §§ 1601-1623h (2006).

39. Act of May 17 1906, ch. 2469, 34 Stat. 197 (authorizing the Secretary of the Interior to allot Homesteads to the Natives of Alaska).

40. *See* NORRIS, *supra* note 7, at 46.

41. The Metlakatla Reservation was created by the Act of Mar. 3, 1891, ch. 561, § 15, 26 Stat. 1095, 1101.

42. NORRIS, *supra* note 7, at 46.

43. 43 U.S.C. §§ 1606-1607 (2006).

Region or Native Village specified by the Act. The Act then required the Secretary of the Interior to transfer to these Regional and Village Corporations those public lands in Alaska that were selected by them.<sup>44</sup>

ANCSA also illustrated the old adage “what one hand giveth, the other taketh away.” Section 1603, subsections (a), (b), and (c) read as follows:

(a) Aboriginal title extinguishment through prior land and water area conveyances

All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of aboriginal title thereto, if any.

(b) Aboriginal title and claim extinguishment where based on use and occupancy; submerged lands underneath inland and offshore water areas and hunting or fishing rights included

All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) Aboriginal claim extinguishment where based on right, title, use, or occupancy of land or water areas; domestic statute or treaty relating to use and occupancy; or foreign laws; pending claims

All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.<sup>45</sup>

While aboriginal title and claims were extinguished by ANCSA, the act said nothing about subsistence. But a committee conference report accompanying the act did:

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44. *Id.* §§ 1604, 1611, 1613.

45. *Id.* § 1603(a)-(c).

The conference committee, after careful consideration, believes that all Native interests in subsistence resource lands can and will be protected by the Secretary through the exercise of his existing withdrawal authority. The Secretary could, for example, withdraw appropriate lands and classify them in a manner which would protect Native subsistence needs and requirements by closing appropriate lands to entry by non-residents when the subsistence resources of these lands are in short supply or otherwise threatened. The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Natives.<sup>46</sup>

#### D. Alaska's First Subsistence Priority Law

Motivated perhaps by section 6(e) of the Alaska Statehood Act (the provision that gave the state management authority over fish and game in Alaska on the condition that the Alaska Legislature provide for the management of fish and game "in the broad national interest") and the language quoted above in the committee conference report accompanying ANCSA, the Alaska Legislature began working on a subsistence bill in 1977. The bill, which became "An Act Relating to Fish and Game Management," was signed by Governor Hammond on July 12, 1978 and became effective on October 10, 1978.<sup>47</sup>

The 1978 law created a new subsistence section in the Alaska Department of Fish and Game<sup>48</sup> and gave the Boards of Fisheries and Game the authority to adopt regulations governing "subsistence uses."<sup>49</sup> It also established a priority for subsistence uses in the event fish stocks or game resources were not sufficient to "assure the continuation of subsistence uses."<sup>50</sup>

"Subsistence hunting" was defined as "the taking of game animals by a state resident for subsistence uses by means defined by the Board of Game."<sup>51</sup> The legislature defined "subsistence fishing" as "the taking, fishing for, or possession of fish, shellfish, or other fisheries resources for

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46. H.R. CONF. REP. NO. 92-746, at 24 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2247, 2250.

47. Act of July 12, 1978, ch. 151, 1978 Alaska Sess. Laws 1.

48. *Id.* § 2, at 1 (amending ALASKA STAT. § 16.05.090).

49. *Id.*

50. *Id.* §§ 3-5, at 1-3.

51. *Id.* § 10, at 4 (amending ALASKA STAT. § 16.05.257(h)(l)).



subsistence uses with gill net, seine, fish wheel, long line, or other means defined by the Board of Fisheries.”<sup>52</sup>

“Subsistence uses” were:

the customary and traditional uses in Alaska of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter or sharing for personal or family consumption . . . .<sup>53</sup>

The 1978 law created a first tier priority for those engaged in hunting or fishing for subsistence uses over those who engage in non-subsistence hunting and fishing, which took effect when the fish or game population was inadequate to supply all subsistence needs of those who engage in subsistence hunting and fishing.<sup>54</sup> The 1978 law also created a second tier priority among those engaged in subsistence hunting and fishing in the event “further restrictions” are necessary. The law distinguished first tier subsistence users<sup>55</sup> from second tier subsistence users on the basis of customary and direct dependence, local residency, and availability of alternative resources. If such “further restrictions” were necessary, these second tier subsistence users would have priority over first tier subsistence users.<sup>56</sup>

The 1978 law did not limit subsistence hunting and fishing to rural residents and, in fact, it did not set out criteria to determine who may engage in subsistence hunting and fishing. Nor did it define what constituted “customary and traditional use.” These questions were left for the Department of Fish and Game’s new subsistence section and the Boards of Fisheries and Game.

### **E. Alaska National Interest Lands Conservation Act and Subsistence**

On December 2, 1980, President Carter signed the Alaska National Interest Lands Conservation Act (ANILCA).<sup>57</sup> ANILCA directly addressed the issue of subsistence hunting and fishing on public

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52. *Id.* § 14, at 5 (amending ALASKA STAT. § 16.05.940(17)).

53. *Id.* § 15, at 5 (amending ALASKA STAT. § 16.05.940).

54. *Id.* § 4, at 2 (amending ALASKA STAT. § 16.05.251).

55. The term “subsistence users” is often used in subsistence litigation to refer to those engaged in hunting and fishing for subsistence purposes. *See* Madison v. State Dep’t. of Fish & Game, 696 P.2d 168, 174, 178 (Alaska 1985).

56. §§ 4–5, 1978 Alaska Sess. Laws at 2–3.

57. Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified at 16 U.S.C. §§ 3101–3233 (2006)).

(federal) lands in Alaska. Title VIII of the Act is entitled “Subsistence Management and Use.” Section 3113 sets out Congress’s findings. According to subsection (1) of Section 3113, Congress “finds and declares” that—

the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional and social existence.<sup>58</sup>

Section 3113 defines the term “subsistence uses” as “the customary and traditional uses by rural Alaska residents of wild, renewable resources.”<sup>59</sup> This linkage between the term “subsistence uses” and “uses by rural Alaska residents” sets the stage for the conflict (discussed below) between the state and the Federal government— which sovereign should manage subsistence hunting and fishing on public lands in Alaska?

Section 3114 creates a preference, or “priority,” for subsistence uses of fish and wildlife over other uses of these resources.<sup>60</sup>

Section 3115, subsections (a), (b), and (c) set out a management structure for subsistence uses of fish and wildlife on public lands.<sup>61</sup> This structure involves local committees and regional councils working with the Secretary of the Interior to formulate plans and regulations regarding the taking of fish and wildlife for subsistence uses.<sup>62</sup>

Section 3115 raises questions of federalism. Section 6(e) of the Alaska Statehood Act, after all, required the Federal government to hand over its authority to administer and manage fish and wildlife to the new state provided “the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest.”<sup>63</sup> This tension is resolved, at least in part, by subsection (d) of section 3115:

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58. 16 U.S.C. § 3111 (2006).

59. *Id.* § 3113.

60. *Id.* § 3114.

61. *Id.* § 3115(a)-(c). “Public lands” are defined in section 3102(3) of ANILCA. *Id.* § 3102(3). They include all lands in Alaska, except state-owned lands, lands selected by Native Corporations under the Alaska Native Claims Settlement Act (ANSCA), 43 U.S.C. §§ 1601-1623h (2006), and lands referred to in section 1618(b) of ANSCA. 16 U.S.C. § 3102(3). *Id.*

62. 16 U.S.C. § 3115(a)-(c).

63. Alaska Statehood Act, Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 340-41 (1958).

The Secretary shall not implement subsections (a), (b), and (c) of this section if the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this subchapter for the taking of fish and wildlife on the public lands for subsistence uses. . . .<sup>64</sup>

According to the Department of the Interior, any state-enacted subsistence program must be “specific to rural Alaska residents.”<sup>65</sup> In other words, the Department’s position was (and is) that only residents of rural Alaska are allowed to engage in subsistence hunting and fishing on public lands.<sup>66</sup>

*1. State Management of Subsistence on Public Lands after ANILCA*

As discussed previously, Alaska’s 1978 subsistence law, though it defined “subsistence uses,” did not define the phrase “customary and traditional use.” But in December of 1981, the Alaska Board of Fisheries adopted a regulation that set out ten characteristics to be used to determine the “customary and traditional” use of Cook Inlet salmon.<sup>67</sup> The Board then used these criteria “to determine” who is “eligible for the subsistence priority” in Cook Inlet.<sup>68</sup> In other words, the Board used these criteria to determine who would be eligible to engage in subsistence fishing in Cook Inlet.

One of the ten criteria used for determining subsistence fisheries in Cook Inlet was “a use pattern established by an identified community, subcommunity, or group having preponderant concentrations of persons showing past use.”<sup>69</sup> Unless an individual could show that he was a member “of an identifiable subsistence community or group,” he

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64. 16 U.S.C. § 3115(d).

65. NORRIS, *supra* note 7, at 99–100. Interior Secretary James Watt, in a letter dated February 25, 1982, to Governor Jay Hammond, noted that the state’s program “was not specific to ‘rural residents’” and that this would have to be remedied if Alaska was to regulate fish and game on public lands. *Id.* (quoting Letter from James G. Watt to Jay S. Hammond (Feb. 25, 1982)), in U.S. DEP’T OF THE INTERIOR, 806 REPORT, ANILCA AND RELATED HISTORY, 1983 Attachment 1 (1984).

66. *See* 50 C.F.R. § 100.5(a) (2010).

67. *Madison v. Alaska Dep’t of Fish & Game*, 696 P.2d 168, 172 n.8 (Alaska 1985) (quoting ALASKA ADMIN. CODE tit. 5, § 01.597(a) (1981) (repealed 1985)).

68. *Id.* at 172.

69. *Id.* at 172, n.8 (quoting ALASKA ADMIN. CODE tit. 5, § 01.597(a)(2) (1981) (repealed 1985)).

“would not qualify for a subsistence use priority.”<sup>70</sup> This regulation “in effect linked subsistence fishing to particular geographic communities.”<sup>71</sup>

It was not until 1982, however, that the Alaska Boards of Fisheries and Game jointly adopted a regulation that “for the first time expressly associated subsistence hunting and fishing rights with rural residents.”<sup>72</sup>

In light of these developments, Secretary of Interior James Watt informed Governor Hammond that Alaska’s subsistence program “will be in compliance with Sections [3113, 3114, and 3115] of ANILCA.”<sup>73</sup> Secretary Watt concluded that “the State retains its traditional role in the regulation of fish and wildlife resources on public lands in Alaska.”<sup>74</sup>

## 2. *The Madison Case and Alaska’s Rural Subsistence Priority*

In *Madison v. Alaska Department of Fish and Game*,<sup>75</sup> the Alaska Supreme Court considered the validity of the Cook Inlet regulation discussed above—i.e., former title 5, section 01.597(a), of the Alaska Administrative Code. The court found the Board of Fisheries’ regulation governing subsistence fishing in the Cook Inlet Region effectively restricted the right to engage in subsistence fishing to members of preexisting subsistence communities or groups.<sup>76</sup> And this, the court held, was inconsistent with Alaska’s 1978 subsistence law.<sup>77</sup>

In the case, Madison, who lived near Homer, applied for a subsistence permit to fish in Cook Inlet.<sup>78</sup> Because he did not meet all ten of the criteria set out in the regulation, Madison was denied a permit.<sup>79</sup> Madison then challenged the validity of the regulation.<sup>80</sup>

As noted above, the 1978 law defined “subsistence fishing” as fishing for “subsistence uses.”<sup>81</sup> “Subsistence uses,” in turn, were defined as “customary and traditional uses . . . for direct personal or family consumption, and for the customary trade, barter or sharing.”<sup>82</sup> “Subsistence fishing,” then, was ultimately defined in the 1978 law as

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70. *Id.* at 177–78.

71. *Bobby v. Alaska*, 718 F. Supp. 764, 767 (D. Alaska 1989).

72. *Id.* at 794–95 (quoting ALASKA ADMIN. CODE tit. 5, § 99.010 (1982)).

73. *Id.* at 813 (quoting Letter of James Watt to Jay Hammond (May 14, 1982)).

74. *Id.* at 812–13 (quoting Letter of James Watt to Jay Hammond (May 14, 1982)). *See also* note 65 *supra*.

75. 696 P.2d 168 (Alaska 1985).

76. *Id.* at 177–78.

77. *Id.* at 170.

78. *See id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

fishing for the purpose of engaging in the “customary and traditional uses” of fish.<sup>83</sup>

The regulation at issue in *Madison* identified ten criteria for determining “customary and traditional uses” of Cook Inlet salmon, including the criterion of “a use pattern established by an identified community, subcommunity, or group having predominant concentrations of persons showing past use.”<sup>84</sup> The Board of Fisheries then determined that only Cook Inlet residents of Tyonek, English Bay, and Port Graham met all ten criteria and made “customary and traditional” use of Cook Inlet salmon. Under the regulation, therefore, only those residents could engage in subsistence fishing. The practical effect of the board’s regulation was to limit subsistence fishing to residents of rural areas in and around Cook Inlet. Indeed, this was exactly what the board said it was authorized to do: “The board argues that the legislature intended to narrow the scope of subsistence fishing to mean fishing by individuals residing in rural communities that have historically depended on subsistence hunting and fishing.”<sup>85</sup>

The board also argued “that the words ‘customary and traditional’ in [section 16.05.940(23) of the Alaska Statutes] authorized it to define first-tier subsistence users by their area of residence.”<sup>86</sup> *Madison* and others appellants challenged the regulation after they could not qualify for a subsistence fishing permit because they were not members of “an identified community, subcommunity or group having preponderant concentrations of persons showing past use.”<sup>87</sup>

The Alaska Supreme Court rejected the board’s interpretation, as it relied on a misconception of the 1978 subsistence law.<sup>88</sup> Section 16.05.251(b) of the Alaska Statutes potentially created two tiers of subsistence users:

The first tier includes *all* subsistence users. Under the statute, all subsistence uses have priority over sport and commercial uses “whenever it is necessary to restrict the taking of fish to assure the maintenance of fish stocks on a sustained yield basis, or to assure the continuation of subsistence uses of such resources . . . .” If the statutory priority given all subsistence users over commercial and sport users still results in too few fish for all subsistence uses, then the board is authorized to

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83. *Id.*

84. *Id.* at 172.

85. *Id.* at 174.

86. *Id.*

87. *Id.* at 177–78.

88. *Id.*

establish a second tier of preferred subsistence users based on the legislative criteria expressed in [section 16.05.251(b) of the Alaska Statutes], namely, customary and direct dependence on the resource, local residency, and the availability of alternative resources.

....

... Moreover, the phrase “customary and traditional” modifies the word “uses” in [section 16.05.940(23) of the Alaska Statutes]. It does not refer to users.<sup>89</sup>

The supreme court concluded that while section 01.597(a) of the Alaska Administrative Code could be used to distinguish first-tier general subsistence users from second-tier preferred subsistence users “since most of the criteria relate to either ‘customary and direct dependence’ or ‘local residence,’” the regulation could not be used to restrict those who are eligible to engage in subsistence hunting and fishing to members of pre-existing communities or, in the court’s words, “to disenfranchise many subsistence users whose interests the statute was designed to protect.”<sup>90</sup> In short, the court held that the 1978 subsistence law had not authorized the State to restrict the right to engage in subsistence hunting and fishing to residents of rural Alaska.

As a result of this holding, the Federal government concluded that Alaska’s subsistence program was no longer consistent with ANILCA. On September 23, 1985, Assistant Secretary of the Interior William Horn notified the state of this.<sup>91</sup> The U.S. Department of the Interior advised Alaska that unless it revised its subsistence program by June 1, 1986, the Department “[would] be obligated to discharge its obligations pursuant to section [3115]” of ANILCA.<sup>92</sup>

### 3. *Alaska’s Second Subsistence Priority Law*

On May 30, 1986, Alaska enacted a second subsistence law.<sup>93</sup> The new law amended a number of sections of the first subsistence law that was enacted in 1978. It created a priority for subsistence hunting and fishing.<sup>94</sup> “Subsistence hunting” was defined as hunting “by a resident domiciled in a rural area of the state.”<sup>95</sup> And “subsistence fishing” was

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89. *Id.* at 174 (citations omitted).

90. *Id.* at 174, 178.

91. *Bobby v. Alaska*, 718 F. Supp. 764, 813–14 (D. Alaska 1989) (quoting Letter from William Horn, Assistant Sec’y of the Interior, to William Sheffield, Governor (Sept. 23, 1985)).

92. *Id.* at 814.

93. Act of May 30, 1986, ch. 52, 1986 Alaska Sess. Laws 1.

94. *Id.* § 6, at 3.

95. *Id.* § 11, at 5.

defined as fishing “by a resident domiciled in a rural area of the state.”<sup>96</sup> The passage of Alaska’s second subsistence law before the June 1 deadline averted a federal takeover of subsistence hunting and fishing on public lands by the Federal government. But this was not to last.

4. *The McDowell Case*<sup>97</sup>

On December 22, 1989, the Alaska Supreme Court held that the rural subsistence preference created by the 1986 amendments to the 1978 subsistence law violated article VIII, sections 3, 15, and 17 of the Alaska Constitution.<sup>98</sup> Section 3 of article VIII reserves “fish, wildlife and waters” in their natural state “to the people for common use.”<sup>99</sup> Section 15 of article VIII provides that “[n]o exclusive right or special privilege of fishing shall be created or authorized in the natural waters of the state.”<sup>100</sup> Section 17 of article VIII requires that “laws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation.”<sup>101</sup>

In reaching its conclusion, the supreme court relied, in part, on a 1983 study by the Alaska Department of Fish and Game that showed that twenty percent of the 255 holders of subsistence salmon permits issued in 1980 for the Tanana River fishery under the original 1978 subsistence law were given to residents who “exhibited the attributes commonly associated with a traditional subsistence lifestyle, even though they all resided in the urban Fairbanks area.”<sup>102</sup> Similarly, the study reported that 38.2% of the city residents of Homer “obtained at least one-half of their meat and fish supply from personal hunting and fishing activities.”<sup>103</sup>

The court also noted that “the study documents the fact that numerous Alaskans who live in areas classified by the regulation as rural do not engage in subsistence activities.”<sup>104</sup> The supreme court concluded that “the residency criterion used in the 1986 act which conclusively excludes all urban residents from subsistence hunting and

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96. *Id.* § 9, at 4.

97. 785 P.2d 1 (Alaska 1989).

98. *Id.* at 1.

99. Alaska Const. art. VIII, § 3.

100. *Id.* § 15.

101. *Id.* § 17.

102. *McDowell*, 785 P.2d at 5.

103. *Id.*

104. *Id.*

fishing regardless of their individual characteristics is unconstitutional.”<sup>105</sup>

Chief Justice Warren Matthews postponed the effective date of the court’s decision until July 1, 1990, which provided time for the state to respond to the court’s determination.<sup>106</sup>

5. *Federal Takeover of Subsistence Hunting and Fishing on Public Lands in Alaska after McDowell*

Alaska failed to enact a new subsistence law by July of 1990. This meant that as of July 1, 1990, the Federal government would assume management of subsistence hunting and fishing on public lands in Alaska. Anticipating that this might happen, the National Park Service, the U.S. Forest Service, and the Bureau of Land Management prepared a set of interim subsistence regulations. These interim regulations appeared in the Federal Register in June of 1990.<sup>107</sup>

What is noteworthy about these interim regulations is that they disclaimed federal jurisdiction over navigable waters on the theory that they were not “public lands” within the meaning of ANILCA and that the United States did not hold title to these waters.<sup>108</sup> As a result, the state retained fish and game management authority of subsistence fishing over all navigable waters in Alaska. This arrangement, however, proved temporary.

6. *State v. Kenaitze Indian Tribe*<sup>109</sup>

In 1992, the state enacted section 16.05.258 of the Alaska Statutes.<sup>110</sup> Since the Federal government regulated subsistence hunting and fishing on federally owned public lands at this time, section 16.05.258 applied only to state lands. This statute gave the Boards of Fisheries and Game the authority to determine non-subsistence areas where subsistence hunting and fishing would not be allowed.<sup>111</sup> If there were not sufficient wild resources to support all subsistence users, section 16.05.258(b)(4) allowed the joint boards to adopt regulations to identify Tier II subsistence users who would be granted a preference over Tier I subsistence users under such circumstances.<sup>112</sup> Subsection (b)(4)(B)(ii) required the boards to “distinguish among subsistence users, through

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105. *Id.* at 9.

106. NORRIS, *supra* note 7, at 163.

107. *Id.* at 164.

108. *Id.* at 165.

109. *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995).

110. Act of July 14, 1992, ch. 1, § 3, 1992 Alaska 2d Spec. Sess. Laws 1, 5–6.

111. *Kenaitze Indian Tribe*, 894 P.2d at 634.

112. *Id.* at 633–34.



limitations based on . . . the proximity of the domicile of the subsistence user to the stock or population.”<sup>113</sup>

The Kenaitze Indian Tribe brought suit in Alaska Superior Court challenging the determination by the Boards of Fisheries and Game of a non-subsistence area in upper Cook Inlet.<sup>114</sup> The superior court ruled in the Tribe’s favor and declared the act’s “non-subsistence areas” provision unconstitutional.<sup>115</sup> The state appealed.<sup>116</sup> On appeal, the Alaska Supreme Court ordered that “the parties brief the constitutionality” of the Tier II domicile factor set out in section 16.05.258(b)(4)(B)(ii).<sup>117</sup> This issue, along with the other issues raised by the parties, became part of the appeal.<sup>118</sup>

In its decision, the supreme court noted that from the very beginning of Alaska’s subsistence program, i.e., the 1978 subsistence statute, a subsistence priority was based on a two tier system:

From the outset, the statute establishing the subsistence priority created two tiers of subsistence users. The first tier includes all subsistence users. The second tier is more restricted. Tier II status becomes important when a fish or game population is inadequate to satisfy all subsistence needs. In such cases Tier I users’ harvest opportunities must be curtailed or eliminated so that Tier II users can harvest the population.<sup>119</sup>

But in determining who is eligible for Tier II priority, the supreme court pointed out that the *McDowell* decision is clear: one’s domicile cannot be used as a determinative factor in granting a Tier II priority.<sup>120</sup> As a consequence, the court went on to rule that under the holding of *McDowell*, the domicile factor of section 16.05.258(b)(4)(B)(ii) “violates sections 3, 15 and 17 of article VIII of the Alaska Constitution.”<sup>121</sup>

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113. *Id.* at 635 (quoting ALASKA STAT. § 16.05.258(b)(4)(B)(ii) (1992)).

114. *See id.* at 634–35.

115. *Id.*

116. *Id.* at 635.

117. *Id.*

118. *See id.*

119. *Id.* at 633.

120. *Id.* at 638.

121. *Id.* at 639. The court upheld section 16.05.258(c), the section that allowed the joint Boards to identify non-subsistence areas. *See id.* at 642.

7. *Alaska v. Babbitt*<sup>122</sup> (the *Katie John Case*): *Alaska loses its Management Authority over Navigable Waters in Alaska*

As noted above, the Secretary of the Interior published temporary subsistence management regulations in 1990.<sup>123</sup> The final regulations, published in the Federal Register in May of 1992, did not differ significantly from the temporary regulations.<sup>124</sup>

After the final regulations were adopted, Alaska filed suit in federal district court and raised the issue of whether the Federal government had any authority at all to regulate subsistence hunting and fishing on public lands in Alaska.<sup>125</sup>

Separately, Katie John, an Athabaskan Indian from Mentasta Village, filed a separate suit in federal district court challenging the Department of the Interior's regulation that provided that the term "public lands," as used in ANILCA, did not include navigable waters.<sup>126</sup> The district court consolidated the two cases.<sup>127</sup>

While the district court ruled against the state on the question of the Federal government's authority,<sup>128</sup> it ruled for Katie John by holding that all navigable Alaska waters were subject to a navigational servitude<sup>129</sup> and, therefore, fell within the definition of "public lands" as set out in ANILCA.<sup>130</sup> The state appealed both rulings to the Ninth Circuit Court of Appeals.<sup>131</sup>

After briefing, but before oral argument in the Ninth Circuit, the state stipulated to a dismissal with prejudice of the issue of whether the Federal government had authority to manage fish and game on public lands in Alaska in the absence of a state subsistence law.<sup>132</sup> The only issue remaining on appeal was whether navigable waters are public lands within the meaning of ANILCA because of the existence of a navigational servitude.

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122. 54 F.3d 549 (9th Cir. 1995). This case later became known as the *Katie John* case. See note 136 *infra*.

123. *Id.* at 551.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. A "navigational servitude" is "an easement allowing the Federal government to regulate commerce on navigable water without having to pay compensation for interference with private ownership rights." BLACK'S LAW DICTIONARY 1401 (8th ed. 2004).

130. *Babbitt*, 54 F.3d at 552.

131. *Id.*

132. *Id.* at 550 n.2.

In a decision issued on April 20, 1995, the Ninth Circuit disagreed with the notion that a navigational servitude is “public land” and ruled instead “that the subsistence priority [of ANILCA] applies to navigable waters [in Alaska] in which the United States has reserved water rights.”<sup>133</sup> The case was remanded to the district court.<sup>134</sup>

On December 19, 1995, the Ninth Circuit withdrew its opinion of April 20, 1995, and issued a second opinion.<sup>135</sup> The only substantive difference between the April opinion and the December opinion is the inclusion of a dissenting opinion by Judge Hall.<sup>136</sup>

On July 14, 2000, the Ninth Circuit issued an order that the *Babbitt* case be heard *en banc*.<sup>137</sup>

In an opinion dated May 7, 2001, the Ninth Circuit “determined that the judgment rendered by the prior panel and adopted by the district court should not be disturbed or altered by the en banc court.”<sup>138</sup> This meant that the Ninth Circuit’s decision of December 19, 1995, was the final word in the matter.<sup>139</sup>

The net result of this complicated appellate history is the holding that the Federal government has the authority to regulate subsistence fishing on all navigable waters in Alaska where the United States has reserved water rights.

On August 27, 2001, Governor Tony Knowles announced that the state would not appeal the *Katie John* case to the United States Supreme Court.<sup>140</sup>

After the final *Katie John* decision of May 7, 2001, and the state’s decision not to appeal the case to the U.S. Supreme Court, it seemed that

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133. *Id.* at 551. To make matters even more complicated, on October 20, 1995, the Alaska Supreme Court in *Totemoff v. State* held that ANILCA did not give the Federal government the authority to regulate subsistence hunting and fishing in navigable waters in Alaska. 905 P.2d 954, 964 (Alaska 1995). Because of this, the state had jurisdiction over a subsistence hunter if he violates Alaska law in navigable waters. *Id.* at 968. As for the April 20, 1995, decision by the Ninth Circuit in *Alaska v. Babbitt*, the Alaska Supreme Court noted that it “is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law.” *Id.* at 963.

134. *Babbitt*, 54 F.3d at 551.

135. *Alaska v. Babbitt (Katie John I)*, 72 F.3d 698, 699 (9th Cir. 1995).

136. *Id.* at 704 (Hall, J. dissenting).

137. *Katie John v. United States*, 216 F.3d 885, 886 (9th Cir. 2000). The title of the case was changed from *Alaska v. Babbitt*.

138. *Katie John v. United States (Katie John II)*, 247 F.3d 1032, 1033 (9th Cir. 2001).

139. *Id.* at 1038 (Tallman, J., concurring) (“By affirming without discussion the district court’s judgment, the Court today implicitly adopts the analysis of the *Katie John I* majority.”).

140. Martha Bellisle & Tom Kizzia, *No Appeal of Katie John*, ANCHORAGE DAILY NEWS, Aug. 28, 2001, at A1.

there was only one alternative to avoid federal management of subsistence hunting and fishing in Alaska: for the Alaska Legislature to pass a bill that would allow the people of Alaska to vote on a constitutional amendment permitting the state to restrict the right to engage in subsistence hunting and fishing to residents of rural Alaska. Such an amendment would make it clear that the right to engage in subsistence hunting and fishing would belong only to residents of rural Alaska. But the legislature to date has been reluctant to pass such a bill, and the tension between the state and the Federal government over the management of subsistence hunting and fishing in Alaska continues.

## PART TWO

### I. FEDERAL SUBSISTENCE MANAGEMENT TODAY

Approximately seventy percent of land in Alaska today is public land owned by the Federal government.<sup>141</sup>

As a result of ANILCA and of the rulings of the Alaska Supreme Court in the *Madison*, *McDowell*, and *Kenaitze* cases, and the Ninth Circuit's decision in the *Katie John* case, the Federal government is now responsible for managing subsistence hunting and fishing on most of Alaska's lands. Consequently, the U.S. Department of the Interior and the U.S. Department of Agriculture have issued subsistence regulations for all "public lands within the State of Alaska."<sup>142</sup> These regulations apply not only to public land but also to "all inland waters, both navigable and non-navigable, within and adjacent to the exterior boundaries of "[those areas identified in the regulations]."<sup>143</sup>

The Department of the Interior's definition of a "subsistence priority" rests on the assumption that ANILCA creates an exclusive priority that limits the right to engage in subsistence hunting and fishing to rural residents of Alaska. The Department's regulations are clear that the only persons who can engage in subsistence hunting and fishing are residents of rural Alaska or rural communities in Alaska:

You may take fish and wildlife on public lands for subsistence uses only if you are an Alaska resident of a rural area or rural

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141. ROSS GORTE & CAROL HARDY VINCENT, CONG. RESEARCH SERV., RL 34273, FEDERAL LAND OWNERSHIP: CURRENT ACQUISITION AND DISPOSAL AUTHORITIES 11 (2007), available at <http://www.policyarchive.org/handle/10207/bitstreams/18812.pdf>.

142. Subsistence Management Regulations for Public Lands in Alaska, 50 C.F.R. § 100.1 (2010).

143. 50 C.F.R. § 100.3(c) (2010).

community . . . . If you are not an Alaska resident or are a resident of a non-rural area or community listed in § 100.23, you may not take fish or wildlife on public lands for subsistence uses under the regulations in this part.<sup>144</sup>

“Rural” areas and “rural” communities are defined as all areas and communities in Alaska, except for the ten non-rural areas identified in the regulations.<sup>145</sup>

This distinction, however, has created a number of anomalies. For example, Saxman, a Tlingit Native village with a population of about 400, is listed as non-rural because of its proximity to Ketchikan, while Kodiak and Sitka are classified as rural.<sup>146</sup>

## II. RATIONALE FOR THE CLAIM THAT ANILCA LIMITS THE RIGHT TO ENGAGE IN SUBSISTENCE HUNTING AND FISHING ON PUBLIC LAND TO RESIDENTS OF RURAL ALASKA

Beginning with the objection raised by Interior Secretary James Watt in February of 1982 about Alaska’s subsistence program<sup>147</sup> and until the Department of the Interior’s 2008 regulations, the Federal government has always assumed that ANILCA, and in particular section 3113 of ANILCA, creates an exclusive right for rural residents in Alaska to engage in subsistence hunting and fishing.<sup>148</sup> This exclusive right is often expressed as a “rural preference.” This assumption has been taken as self-evident.

The justification for this position, it would seem, lies in the plain language of section 3113 of ANILCA. Section 3113 reads, in part, as follows:

As used in this Act, the term “subsistence uses” means the customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles

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144. 50 C.F.R. § 100.5(a) (2010).

145. 50 C.F.R. § 100.23 (2010).

146. *Id.* This same anomaly occurred in the Department of Interior’s 2007 regulations. See Alex deMarban, *Subsistence Still a Fit for Kodiak*, ANCHORAGE DAILY NEWS, Dec. 13, 2006, at B1.

147. See *supra*, note 65.

148. See 16 U.S.C. § 3113 (2006). This section was amended by the Act of November 14, 1997, Pub. L. No. 105-83, § 316(b), 111 Stat. 1543, 1592, but the amendment lapsed on December 1, 1998, when Alaska failed to adopt a subsistence program by this date that was consistent with ANILCA. See Act of Nov. 14, 1997, Pub. L. No. 105-83, § 316(d), 111 Stat. 1543, 1595.

out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.<sup>149</sup>

The conclusion that section 3113 creates an exclusive rural preference rests on this inference: since subsistence uses of fish and wildlife are those customary and traditional uses that rural residents of Alaska make of fish and wildlife, it must follow that no non-rural residents of Alaska can engage in subsistence hunting and fishing on public lands in Alaska.

So, if “‘subsistence uses’ means the customary and traditional uses by rural Alaska residents of wild, renewable resources,”<sup>150</sup> then it must also mean that *only* residents of rural Alaska can engage in subsistence hunting and fishing for the purpose of these “customary and traditional uses.”<sup>151</sup> Section 3113, then, must be understood to limit the right to engage in subsistence hunting and fishing on public lands in Alaska to residents of rural Alaska.

### III. DOES SECTION 3113 OF ANILCA LIMIT THE RIGHT TO ENGAGE IN SUBSISTENCE HUNTING AND FISHING ON PUBLIC LANDS TO RESIDENTS OF RURAL ALASKA?

How persuasive is the argument that ANILCA creates an exclusive rural preference?

First of all, as the discussion above shows, logic does not allow one to draw the conclusion that only residents of rural Alaska can engage in subsistence hunting and fishing.<sup>152</sup> One cannot legitimately infer from

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149. 16 U.S.C. § 3113.

150. *Id.*

151. *Id.*

152. It is easy to see the problem with this argument if it is restated in syllogistic form: The text of section 3113 says that any “subsistence use” of fish and wildlife is a “customary and traditional use” of fish and wildlife by residents of rural Alaska. Moreover, no use of fish and wildlife by a non-resident of rural Alaska is a customary and traditional use of fish and wildlife by residents of rural Alaska. Therefore, it follows that no non-resident of rural Alaska is a person who engages in subsistence hunting and fishing on federal land.

This syllogism can be expressed as follows:

All *A* are *B*

No *C* is *B*

No *S* is *P*

*A* is the “subsistence use” of fish and wildlife; *B* is the “customary and traditional use” of fish and wildlife by residents of rural Alaska; *C* is the use of fish and wildlife by a non-resident of rural Alaska; *S* symbolizes non-resident of

the definition of “subsistence *uses*” – as those customary and traditional *uses* that rural Alaskans make of fish and wildlife – that it must therefore follow that only rural Alaskans can engage in subsistence hunting and fishing on public lands in Alaska.

Second, nowhere in ANILCA do we find the term “rural preference”; neither section 3113 nor any other section of ANILCA specifically sets out qualifications for identifying those Alaskans who are eligible to engage in subsistence hunting and fishing.

Third, the section-by-section analysis in Senate Report No. 96-413, which accompanied ANILCA, points out that the definition of “subsistence uses” in section 3113 is “based on the definition of that term set forth in Section 15, Chapter 151 [of the Session Laws of Alaska] 1978.”<sup>153</sup> The Alaska Supreme Court, however, has ruled that nothing in chapter 151 of the Session Laws of Alaska 1978 creates an exclusive rural preference.<sup>154</sup>

Fourth, Senate Report No. 96-413 also notes that “[t]he definition of ‘subsistence uses’ is intended to include *all* Alaska residents who utilize renewable resources for direct personal or family consumption.”<sup>155</sup>

Lastly, what is most obvious about section 3113 is that it defines “subsistence uses,” not users.<sup>156</sup>

In light of the text of section 3113, as well as the section-by-section analysis of Senate Report No. 96-413, it seems to be something of a stretch to convert what is essentially a definitional statute – the purpose of which is to define “subsistence uses” – into a right-granting statute that confers an exclusive right to engage in the subsistence use of wild resources on a particular class of Alaskans.

A more plausible reading of section 3113 is that its purpose is twofold: (1) to identify a particular class of *uses* of wild resource (“subsistence uses”) and (2) to define the uses that belong to this class. It does this first by defining “subsistence uses” to mean those uses of “wild, renewable resources” that one finds to be “customary and

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rural Alaska; and *P* symbolizes a person who engages in subsistence hunting and fishing on federal land.

The problem with the argument is that it has too many terms: *A*, *B*, *C*, *S*, and *P*. A valid syllogism can have only three terms: subject (*S*), predicate (*P*) and a middle term (*m*). See IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 244–48 (Maggie Barbieri ed., 7th ed. 1953).

153. S. REP. NO. 96-413, at 268 (1979), reprinted in 1980 U.S.C.C.A.N. 5070, 5212. This definition is codified at section 16.05.940 of the Alaska Statutes.

154. See *Madison v. Alaska Dep’t of Fish & Game*, 696 P.2d 168, 174, 178 (Alaska 1985).

155. S. REP. NO. 96-413, at 268–69 (emphasis added).

156. 16 U.S.C. § 3113.

traditional” among rural residents of Alaska.<sup>157</sup> Section 3113 then identifies this class of uses more specifically by describing it as comprising those uses of “wild, renewable resources” including uses:

for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.<sup>158</sup>

Section 3113, then, is reasonably understood to identify a particular class of uses of “wild, renewable resources”: those uses that are found to be “customary and traditional” among the residents of rural Alaska.<sup>159</sup> In other words, the many different ways residents of rural Alaska generally make use of wild, renewable resources are what form the basis of the definition of “subsistence uses.”<sup>160</sup>

This understanding of section 3113 is consistent with the obvious fact that its purpose is to define “subsistence uses.”<sup>161</sup> It does not define “subsistence users.”<sup>162</sup>

However, there is a note of caution here. Even if section 3113 of ANILCA is understood as simply defining a class of “subsistence uses” and nothing more, it would be a mistake to conclude that ANILCA does not create a priority preference for subsistence users who reside in rural Alaska. ANILCA does create a rural preference, but it is a preference that is distinct from any notion of exclusivity.

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157. *Id.*

158. *Id.*

159. *Id.*

160. The argument here is not that section 3113 is unconstitutional; rather, the text of section 3113 does not support the claim that it creates a right to engage in subsistence hunting and fishing that is exclusive to residents of rural Alaska. If the text of section 3113 did support such a claim, the statute of limitations set out in 28 U.S.C. § 2401(a) would likely apply to a direct constitutional challenge to section 3113. However, it is unlikely § 2401(a) would affect a challenge to the Department of the Interior’s adoption of its subsistence regulations as exceeding its statutory authority. *See Wind River Mining Corp. v. United States*, 946 F.2d 710, 714–15 (9th Cir. 1991).

161. Section 3113 of ANILCA was based on the definition of “subsistence uses” set out in section 16.05.940 of the Alaska Statutes. *See* S. REP. NO. 96-413, at 268–69 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5212.

162. This very same point was made by the Alaska Supreme Court in *Madison v. State, Department of Fish & Game*, 696 P.2d 168, 174 (Alaska 1989) (“Moreover, the phrase ‘customary and traditional’ modifies the word ‘uses’ in [section 16.05.940(23) of the Alaska Statutes]. It does not refer to ‘users’”). The term “users,” as noted above refers to those who have a right to engage in subsistence hunting and fishing.



**IV. SECTION 3114 OF ANILCA CREATES A SUBSISTENCE  
PREFERENCE FOR RESIDENTS OF RURAL ALASKA IN TIMES OF  
SCARCITY OF WILD, RENEWABLE RESOURCES**

Section 3114 of ANILCA reads as follows:

Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

- (1) customary and direct dependence upon the populations as the mainstay of livelihood;
- (2) local residency; and
- (3) the availability of alternative resources.<sup>163</sup>

Section 3114 is best understood as creating a progression of preferences for subsistence users—that is, those who hunt and fish for subsistence uses. If it is necessary to restrict the taking of “populations of fish and wildlife” in subsistence areas “in order to protect the continued viability of such populations” or the continuation of subsistence uses, those who are eligible to engage in subsistence hunting and fishing are preferred over those who take fish and wildlife for non-subsistence uses. This is the first (Tier I) preference created by the first sentence of section 3114: “the taking on public lands of fish and wildlife for non-wasteful subsistence uses shall be accorded priority over taking on such lands of fish and wildlife for other purposes.”<sup>164</sup>

There can be no disagreement over the meaning of the Tier I preference set out in the first sentence of section 3114. Question arise, however, about subsections (1), (2), and (3).

How are criteria (1), (2), and (3) of section 3114 to be applied to the class of subsistence users when the threat to the viability of fish or wildlife populations is so severe that even subsistence users must be

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163. 16 U.S.C. § 3114 (2006).

164. *Id.*

limited?<sup>165</sup> Which members of the class of subsistence users are to be granted a preference over the rest?

A suggested answer to this question lies in the reasonable assumption that Congress's goal in enacting a progression of subsistence preferences is to ensure that the subsistence user who is the most dependent on fish or wildlife resources will be the very last to be restricted when there is a threat to the viability of that resource.<sup>166</sup>

Consider this example: a restriction on the taking of moose has already been implemented in a particular subsistence area so that now only subsistence hunters can hunt moose in the area—a Tier I preference is in place.

Now suppose the moose shortage continues and the number of subsistence users who hunt moose must be curtailed. Suppose further that there are two subsistence users who hunt moose in the area. One resides in the subsistence area but does not have a “customary and direct dependence upon the population as a mainstay of livelihood.” The other has a “customary and direct dependence,” but does not reside in the area. Who gets the preference (i.e., the Tier II preference)? Reason and fairness say that the second subsistence user should have priority over the first on the basis of section 3114(1).<sup>167</sup> By the same token, it would be irrational and unfair to give the first subsistence user priority over the second simply because he resides in the subsistence area even though he lacks a “customary and direct dependence”<sup>168</sup> on the moose population. Local residence, then, should play no part in determining who gets a Tier II preference.

The moose population then continues to decline and further restrictions on subsistence users are required. Imagine two subsistence moose hunters in the area: *A* and *B*. Both have a “customary and direct dependence” on the moose population, and both have been granted a Tier II preference. *A* resides in the subsistence area but has “alternative resources” available to him. In contrast *B* resides outside the subsistence area but has no “alternative resources” available to him. Who gets the Tier III preference? If Congress's intention is to ensure that the subsistence user who is most dependent on the resource should be the very last to be restricted, is it plausible to argue that *A* should get a Tier

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165. Section 3114 identifies these criteria but is silent as to how they should be applied in this situation. *See id.*

166. *See* 16 U.S.C. § 3111(2) (2006) (“[T]he situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses . . .”).

167. *Id.* § 3114(1).

168. *Id.*

III preference because he resides in the subsistence area even though he has “alternative resources” available to him?

Such an outcome makes no sense because it implies that whenever a Tier III preference has to be implemented, a Tier II subsistence user who does not reside in the subsistence area and who has no “alternative resources” available to him will always be passed over in favor of another Tier II subsistence user who is a local resident in the subsistence area where the shortage exists *even* if this subsistence user has alternative resources available to him.

An outcome like this is incongruous and undesirable. And it results from a less than reasonable reading of section 3114.<sup>169</sup>

This example demonstrates that the only purpose of the “local residency” criterion of section 3114(2) is to help determine whether or not alternative resources are available to a subsistence user. If alternative resources exist in the local area where a subsistence user resides, then it is fair to conclude that alternative resources are available to him. If they do not exist in the local area where he resides, it is fair to conclude that alternative resources are not available to him.

The most reasonable reading of section 3114 is that it creates a three-tier priority system:

- **Tier I:** If, in a given local subsistence unit, it is necessary to restrict the taking of fish or wildlife because there is not enough fish or wildlife for the class of all those who engage in hunting and fishing in the unit, then a priority preference is granted to all members of this class who hunt and fish *for subsistence uses* over all those who hunt and fish *for non-subsistence uses*. This priority is created by the first sentence of section 3114.
- **Tier II:** If, in a given local subsistence unit, it is necessary to restrict the taking of fish or wildlife because there is not enough fish or wildlife in the unit for the class of all those who engage in hunting or fishing *for subsistence uses*, then a priority preference is granted to all members of this class who have a “customary and direct dependence” on fish or game “as the mainstay” of “their “livelihood” over those other members of this class who lack such a “customary and direct dependence.” This priority is created by the second sentence of section 3114 and subsection (1).
- **Tier III:** If, in a given subsistence unit, it is necessary to restrict the taking of fish or wildlife because there is not

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169. See *Metro. Edison v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983) (“[W]e cannot attribute to Congress the intention to . . . open the door to such obvious incongruities and undesirable possibilities.”) (quoting *United States v. Dow*, 357 U.S. 17, 25 (1958)).

enough fish or wildlife in the unit for the class of all those who hunt or fish for subsistence uses and who have a “customary and direct dependence” of fish or wildlife as “the mainstay” of “their livelihood,” then a priority preference is granted to all members of this class who lack “the availability of alternative resources” in the areas where they reside over other members of the class who do not lack this availability. This priority is granted by the second sentence of section 3114 and subsections (2) and (3).

As a practical matter, most all of those who reside in rural Alaska will be eligible for Tier II and Tier III preferences. The overwhelming majority of subsistence users who have a “customary and direct dependence”<sup>170</sup> on the resource and who lack “the availability of alternative resources”<sup>171</sup> will be found in rural Alaska. But this preference is not granted solely on the basis of residence. Rather, local residence is a factor to be considered in establishing whether a given member of the class of Tier II subsistence users is eligible for a Tier III preference because he or she lacks “the availability of alternative resources.”<sup>172</sup>

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170. 16 U.S.C. § 3114.

171. *Id.*

172. An objection to this interpretation of ANILCA is that other sections of ANILCA make it clear that the purpose of the Act is to ensure a subsistence lifestyle for rural residents. *See, e.g.*, 16 U.S.C. § 3101(c) (2006) (The “interest and purpose of this Act” is “to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.”); 16 U.S.C. § 3111(1) (2006) (“[T]he continuation of the opportunity for subsistence uses by residents of rural Alaska . . . is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.”); 16 U.S.C. § 3112(1) (2006) (“[T]he policy of Congress [is] the utilization of the public lands in Alaska . . . to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands . . . [and] the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so . . .”).

The reply to this objection is that the interpretation of section 3114 of ANILCA, discussed above, is entirely consistent with the language of sections 3101, 3111, and 3112. In times of a wild resource shortage, all those who engage in subsistence hunting and fishing and have a “customary and direct dependence” on the resource are granted a Tier II priority over those who do not. In reality, virtually all of those who receive a Tier II priority will be residents of rural Alaska. Similarly, if a wild resource shortage continues, all those who are already eligible for a Tier II priority and who lack alternative resources are granted a Tier III priority over those who do not. Again, all of those who receive a Tier III priority will necessarily be residents of rural Alaska, and none will be non-rural residents. Therefore, the “intent and purpose” of ANILCA to safeguard the “subsistence uses by residents of rural Alaska” and to “provide the opportunity for rural residents engaged in a subsistence way of life to do so” is realized under this understanding of section 3114 of ANILCA.

Under this view of the preferences created by section 3114, residents of rural Alaska have their subsistence rights protected *not* because they alone are allowed to engage in subsistence hunting and fishing, but because in times of shortage, those subsistence users who reside in rural Alaska will be the very last to be affected by a government agency's restriction on the taking of fish or wildlife.

As a political matter, Alaskans are fair-minded people and the great majority would find that this understanding of the rural preference created by ANILCA makes good sense.<sup>173</sup>

As a legal matter, this understanding of section 3114 would easily pass a federal equal protection challenge. If the strict scrutiny test were to be applied, the question would be whether the underlying purpose of title VIII of ANILCA is "compelling" and whether the progression of the multi-tier subsistence preferences created by section 3114 is "narrowly tailored" to further this underlying purpose.<sup>174</sup>

The purpose of ANILCA, after all, is to provide residents of rural Alaska with the opportunity to live a subsistence lifestyle:

It is hereby declared to be the policy of Congress that—

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least impact possible on rural residents who depend upon subsistence resources of such lands, consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VIII of this Act, the purpose of this subchapter is to provide the

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173. This is to be contrasted with the divisiveness that is brought on by the claim that ANILCA restricts the right to engage in subsistence hunting and fishing on public lands in Alaska to only residents of rural Alaska. This divisiveness was apparent in the political firestorm that followed the Knowles administration's proposal to amend the Alaska Constitution to grant an exclusive rural subsistence priority. See Dave Donley et al., *Bess v. Ulmer – The Supreme Court Stumbles and the Subsistence Amendment Falls*, 19 ALASKA L. REV. 295, 331–32 (2002) ("Governor Knowles' proposed subsistence amendment conflicts with the historic principle embodied in Alaska's Constitution. Changing the constitution to allow the state to discriminate on grounds of place of residence blatantly disregards the Framers' goals of broad public access, equal protection under the law, and equal, not special, rights and privileges with respect to natural resources.").

174. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (explaining the strict scrutiny test). It is uncertain whether an exclusive subsistence preference that permits only rural residents of Alaska to engage in subsistence hunting and fishing would pass the "narrowly tailored" component of the strict scrutiny test.

opportunity for rural residents engaged in a subsistence way of life to do so . . . .<sup>175</sup>

Moreover, this purpose is supported by congressional findings:

The Congress finds and declares that—

(1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional and social existence and to non-Native physical, economic, traditional and social existence;

(2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses . . . .<sup>176</sup>

One would be hard put to argue that Congress's purpose of providing "the opportunity for rural residents engaged in a subsistence way of life to do so" is not a "compelling" purpose when it rests on Congress's finding that subsistence uses by Native and non-Native residents of rural Alaska on public lands "is essential" to both Native and non-Native "physical, economic, traditional and social existence." Surely, Congress has a compelling interest in ensuring that those who are the most dependent on subsistence hunting and fishing on public lands will be the last to be affected by government restrictions on the taking of fish and game.

Similarly, the three-tier subsistence priority preference created by section 3114 is "narrowly tailored" in that there is a tight fit between the government's goal—preserving subsistence resources for those who need them most—and the means that government uses to reach that goal—creating a tiered structure to gauge need and applying restrictions first to those who are determined to be less needy. The statute does no more and no less than necessary to achieve the government's compelling purpose.

The same result would occur if the less stringent "rational basis" test were used. If this test were used, it would be difficult to argue that section 3114 lacks a "legitimate purpose," is "unreasonable and arbitrary," and has no "fair and substantial relation to the object" of ANILCA's subsistence preference. This is because section 3114 has the practical effect of ensuring that residents of rural Alaska, both Native

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175. 16 U.S.C. § 3112.

176. *Id.* § 3111(1)-(2).

and non-Native, are the very last group to have their subsistence rights limited.<sup>177</sup> Particularly in light of the congressional findings discussed above, the three-tier subsistence preference structure of section 3114 easily satisfies the rational basis test.

The outcome would be the same under Alaska law were the state to adopt a three-tier preference classification system consistent with section 3114. In *Alaska Department of Fish & Game v. Manning*,<sup>178</sup> the Alaska Supreme Court considered two tests for determining whether a statutory or administrative burden on the subsistence activities of an identifiable group infringes on the “open access values” of article VIII of the Alaska Constitution.<sup>179</sup>

The first test, the “more lenient close scrutiny test,” requires that the statute or regulation “be closely related to an important state interest.”<sup>180</sup>

The second test is termed “demanding scrutiny.”<sup>181</sup> It requires that the “purpose of the burden must be at least important” and that the “means used to accomplish the purpose must be designed for the least possible infringement on article VIII’s open access values.”<sup>182</sup>

The state has an important purpose or interest in ensuring “that those Alaskans who need to engage in subsistence hunting and fishing in order to provide for their basic necessities are able to do.”<sup>183</sup> And the means to accomplish this purpose, i.e., the three-tier preference system, is carefully drawn to result in “the least possible infringement on article VIII’s open access values.”<sup>184</sup>

Whether the “close scrutiny” test or the “demanding scrutiny” test is applied, the three factors set out in section 3114 are not only “closely related to an important state interest”<sup>185</sup> but also equitably “designed for the least possible infringement on article VIII’s open access values.”<sup>186</sup>

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177. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1930); *see also* *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

178. 161 P.3d 1215 (Alaska 2007).

179. *Id.* at 1220–21 (citation omitted).

180. *Id.* at 1221 (citation omitted).

181. *Id.*

182. *Id.* at 1220.

183. *McDowell v. State*, 785 P.2d 1, 10 (Alaska 1989).

184. *Id.*

185. *Manning*, 161 P.3d at 1221.

186. *McDowell*, 785 P.2d at 10.

**V. THE SUBSISTENCE PREFERENCE FOR RURAL RESIDENTS OF  
ALASKA CREATED BY SECTION 3114 DOES NOT CONFLICT WITH  
THE HOLDING IN *KENAITZE***

The Alaska Supreme Court held in *State v. Kenaitze Indian Tribe*<sup>187</sup> that one's domicile cannot be used as the sole basis for making a determination of his or her eligibility to participate in subsistence hunting and fishing.<sup>188</sup> The rationale of the *Kenaitze* decision as it relates to the domicile issue is found in the following analysis, which draws on the *McDowell* decision:

Where the necessity for the preservation of the wild game and fish exists in certain territories of the state, that territory may be segregated for the purpose of regulating the right to take game and fish therein; *but the privilege of taking and using same must be extended to the people of the state outside of the territory upon the same terms that are given to those who are residents of the territory embraced in the legislation.*

Our holding in *McDowell* is controlling here. The requirements of the equal access clauses apply to both tiers of subsistence users. Just as eligibility to participate in all subsistence hunting and fishing cannot be made dependent on whether one lives in an urban or rural area, eligibility to participate in Tier II subsistence hunting and fishing cannot be based on how close one lives to a given fish or game population.<sup>189</sup>

In determining whether *Kenaitze* conflicts with the three-tier preference of section 3114 discussed above, the question becomes whether "the privilege of taking and using" fish and wildlife under the priority preferences created by Tiers II and III is "extended to the people of the state . . . upon the same terms that are given to those who are residents of the territory embraced in the legislation."<sup>190</sup>

Consider Tier II:<sup>191</sup> it has nothing at all to do with residence; it rests simply on whether a given member of the class of subsistence users has a "customary and direct dependence" on fish or wildlife "as the

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187. 894 P.2d 632 (Alaska 1995).

188. *Id.* at 642.

189. *Id.* at 638 (citations omitted) (quoting *McDowell*, 785 P.2d at 12).

190. *Id.*

191. Since Tier I distinguishes between those who take fish and game for subsistence purposes and those who take these resources for other purposes, it has nothing to do with residence.



mainstay” of “their livelihood.”<sup>192</sup> It is likely that most of those who are granted a Tier II preference reside in rural Alaska, but the fact that they may be rural residents does not, by itself, entitle them to the preference. A subsistence user might be eligible, or ineligible, for a Tier II preference regardless of whether he is a resident of rural Alaska.

The relationship between the Tier III preference and residence is more complicated. While it is true that the great majority of those who are eligible for a Tier III preference will without doubt reside in rural Alaska, they are not granted this preference because of where they live. The decisive factor in determining their eligibility is the fact that they lack “the availability of alternative resources.”<sup>193</sup> Of course, in determining whether alternative resources are available, one must necessarily take into consideration where the subsistence user lives. However, this is done not to determine eligibility for the preference, but rather to determine whether alternative resources are available to the individual.<sup>194</sup> The fact that he or she resides in rural Alaska, taken by itself, does not automatically make the individual eligible or ineligible for a Tier III preference.

A candidate for a Tier III preference who resides in a non-rural area is evaluated on the same terms that are applied to a rural candidate: “the availability of alternative resources.”<sup>195</sup>

The “local residence” criterion in section 3114(2),<sup>196</sup> then, is not an independent factor that stands alone. Its only purpose is to assist administrators in making a Tier III preference decision. It provides guidance in determining whether alternative resources are in fact available. This understanding of the relationship between “local residence” and the application of the “alternative resources” criterion is entirely consistent with the holding of the Alaska Supreme Court in *Kenaitze*.<sup>197</sup>

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192. 16 U.S.C. § 3114 (2006).

193. *Id.*

194. It would be impossible to determine the factor of “availability” without inquiring where a subsistence user resides.

195. 16 U.S.C. § 3114. Depending on the particular circumstances in each case, it is conceivable that a subsistence user who resides in an urban area will be granted a Tier III preference, while another subsistence user who resides in rural Alaska will not.

196. *Id.* § 3114(2).

197. *State v. Kenaitze Indian Tribe*, 894 P.2d 632 (Alaska 1995). Those who would argue that the “local residence” criterion of section 3114 of ANILCA must be considered to be an independent factor are necessarily committed to the position that section 3114 creates a progression of four subsistence preferences: (1) Tier I: subsistence users over non-subsistence users; (2) Tier II: subsistence users who have a “customary and direct dependence” on a resource over those subsistence users who do not; (3) Tier III: Tier II subsistence users who reside in

## CONCLUSION

This Article has argued that there is no real contradiction between the Alaska Constitution and the subsistence preference created by ANILCA. Nothing in ANILCA restricts the right to engage in subsistence hunting and fishing to only residents of rural Alaska.

If this argument is sound, and if Alaska should choose to regain its authority to regulate subsistence hunting and fishing on public lands, it can do so by adopting a subsistence program that is consistent with sections 3113, 3114, and 3115 of ANILCA. This can be done without amending Alaska's constitution. At the same time, however, any subsistence program consistent with the priority preferences in section 3114 of ANILCA will, both as a logical and a practical matter, protect the subsistence rights of rural Alaskans; if subsistence rights have to be limited because of a threat to the viability of a fish or wildlife population, then the very last group of subsistence users to be limited will be the residents of rural Alaska.

How this question will finally be resolved is a political matter. But this is no ordinary political issue. Rather, it is a matter that raises a difficult question in political theory. A philosophical divide exists between those who argue that the cornerstone of any democratic regime is the principle of individual rights and those who take the view that at least some political rights, though seemingly individual in nature, actually belong to a community or culture.<sup>198</sup> The former understand the Alaska Constitution as protecting an "individual reliance on fish and

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the area experiencing a viability threat to the resource over those Tier II subsistence users who do not; and (4) Tier IV: Tier III subsistence users who reside in the area experiencing shortages and who lack available resources over those Tier III subsistence users who reside in the area and who do not lack available resources.

Thus, whenever a Tier III preference has to be implemented, a Tier II subsistence user who does not reside in the subsistence area and who has no "alternative resources" available to him will always be passed over in favor of another Tier II subsistence user who simply resides in the subsistence unit where the viability problem exists. This will be true even if the subsistence user who is a local resident has alternative resources available to him.

Under this view of section 3114, a Tier IV preference applies only to those subsistence users who reside in the affected subsistence area. The incongruity and unreasonableness of the four-tier view of section 3114 is that the non-resident subsistence user who is eligible for a Tier II preference is automatically ineligible for a Tier III preference and is not even in the running for a Tier IV preference, even though he lacks any available "alternative resources."

198. William M. Bryner, Note, *Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 ALASKA L. REV. 293, 322 (1995).

game for sustenance.”<sup>199</sup> The latter understand subsistence to be “a kind of community entitlement.”<sup>200</sup>

The tension between these two philosophical views gives rise to two opposing concerns. One side fears that if the notion of group rights—in the sense of a group claim to certain resources held in common by the entire political community—becomes accepted in our democracy, then the very idea of individual rights is threatened. The other side fears that “where Native rights and culture are pitted against states['] rights and the culture of the individual, Native rights and cultures will lose.”<sup>201</sup>

The question is not whether to amend Alaska’s constitution; the real subsistence issue is whether and how these two opposing views might be reconciled through the democratic process.

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199. David Case, *Will Federal or State Management Afford Alaska Natives a More Effective Voice?* CULTURAL SURVIVAL, Sept. 30, 1998, available at <http://www.culturalsurvival.org/ourpublications/csq/article/will-federal-or-state-management-afford-alaska-natives-a-more-effective-> (last visited Oct. 27, 2010).

200. *Id.*

201. *Id.*